CHAPTER V

CONTROLS OVER PAWNBROKERS AND MONEYLENDERS

A. General Observations: Pawnbroking

Pawnbrokers are subject to the various provisions in both the Pawnbrokers Act 1972 and the Pawnbrokers Regulations 1972 governing the pawnbroking institution in the country. The Ministry of Housing and local Government is responsible for implementing the Act. However, as the revenue accruing from the issuing of pawnshop licences has been assigned to the individual State Government by the Federal Constitution[1] the day to day administration and enforcement of the Act have been given to these State governments. In the Federal Territory of Kuala Lumpur the Dewan Bandaraya is in charge. In Penang the State Secretary is responsible.

It cannot be denied that the machinery of control is a vital necessity, without which abuse and oppression of pawners would be rampant.

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[1] Federal Constitution Malaysia
10th Schedule I 111-3

B. Licensing Provisions for Pawnbrokers

It is an acknowledged fact to any administrator that one manner of controlling an activity is by means of the licensing instrument, although it is arguable only to what extent. Section 10 (2)[2] of the Act empowers the Minister of the Ministry of Housing and Local Government to notify in the Gazette[3] the appointment of the number of licensing officers in each State as may be necessary for purposes of the Act. In Peninsular Malaysia, in practice, the various State Secretaries are appointed as as licensing officers but the licensing officer for Kuala Lumpur is the Datuk Bandar.[4]

Part II of the Act relates to provisions for such licensing. Section 7 states that no person shall act as a pawnbroker except under a licence granted under the Act. Section 8 lays down that no licence is to be issued except upon the production of a certificate signed by an Assistant Superindent of Police or by an officer higher than this rank or by the officer in charge

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[2] See PU (B) 37/73 to PU (B) 49/73

[3] Government Gazette of Malaysia 1973
PU (B) 37 to PU (B) 49: Government Printers

[4] Government Gazette of Malaysia 1974
PU (B) 47: Government Printers

of the police district that the particular person is a proper person to be licensed as a pawnbroker.[5]

Ultimately it seems that the number of such licences granted in the tender system is a matter of policy at the discretion of Minister who will be answerable to Parliament for his actions and decisions.

Eventually, the successful licensee must enter into a Bond with two sureties approved by the licensor for the proper conduct of his business under the license, payment of fees due and giving sufficient security either by cash or by mortgage of or charge upon the immoveable property for due performance of his obligations under the bond.[6] The kind of bond prescribed is found in the 2nd Schedule of the Pawnbrokers Regulations 1972.[7] The licences issued under the Act are in the prescribed forms found in 3rd Schedule of the same Regulations.[8]

The particular licence issued cannot be assigned to others without written permission of the licensing

[5]Section 8 Pawnbrokers Act 1972
[6]Section 9 Ibid
[7]Appendix II for 2nd Schedule
[8]Appendix II for 3rd Schedule

officer and if the licence is issued for a certain shop, it cannot be used for another shop except again with the written permission of the licensing officer.

As only licensed pawnbrokers (except those few exempted under the Act can operate the pawnbroking trade, the natural inference is that it ought to be an easier task for the authorities concerned to have an overall supervision of the trade hence any strayed pawnbrokers ought to be more noticeable.

Those found running a pawnbroking business without a licence can be subject to a fine not exceeding $5,000 for the first offender and for a second or subsequent offence, the fine levied will exceed $10,000 or an imprisonment term not exceeding one year or both.

In Khoo Aing Hong v Meyapah Chetty,[9] the court held that the onus is on the pawnbroker to show that he has a licence and not on the prosecution to prove he has not, where he is charged with carrying on his business without licence. But on the other hand, in Pawnbroker v Ramasaswary Padiachee,[10] the accused was

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[9](1680) 2 Ky 124

[10](1882) 3 Ky 148 See Ch. III Definitions on Pawnbrokers for more details

charged with carrying a pawnbroking business without a licence. However, Sidegreaves C.J. of the Court of Appeal held that a single act of taking a pledge at pawn did not make a person punishable under Section 5 of the then Pawnbroking Ordinance 1872. It must connote habitual taking of pawn.

In P.P. v Wan Hee[11], the respondent, a licensed moneylender received gold ornaments in pawn as security for loans advanced to three persons at the interest rate of 12 per cent per annum and instead of issuing the statutory form of pawnbrokers receipt, obtained from each borrower a promissory note. The counsel contended in the magistrate court that section 3 of the then Pawnbrokers Enactment did not say this to be an offence. Nevertheless the Appeal Court held that the penalty for contravention of section 3 of the Enactment was laid down in section 25 and the respondent was guilty of the offence of acting as a pawnbroker without a licence.

In short, it can be said that since the licence granted is subject to the Pawnbrokers Act and the Pawnbrokers Regulations both of 1972 it is presumed that the licensee is not free "to go on frolics of his own".

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[11] (1962) MLJ 384

Besides the question of the bond as well as the security the licence is supposed to check the pawnbrokers who have a tendency to stray. Nevertheless, in practice, whether the licensing provisions can fulfil their role effectively in controlling those pawnbrokers who abuse the system is another question.

C. Provisions for Forfeiture of the Pawnbroker's Licence

The presence of the forfeiture provisions in the law is meant to act as a ceterrent and likened to the Sword of Damocles hanging over the pawnbrokers' heads in case they should blatantly flout such law.

For instance by virtue of section 11 of the Act,[12] the Minister is conferred with the power to revoke any licence granted under the Act without assigning any reason. Again under Section 11 (2) (a) licensing officers are also empowered to cancel such licences if the licensees have been convicted of any offence involving fraud or dishonesty or of any breach of the provisions of the Act or of any regulations made thereunder or of any conditions of his licence. Default in meeting any fee payable in respect of such licence

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[12] Pawnbrokers Act 1972

or any portion thereof shall not be paid on the due date will also result in the pawnbrokers licence be cancelled by the licensing officer at any time.

The forfeiture provisions can really be effective as a deterrent to those pawnbrokers who flout the law and exploit their customers if only the authorities concerned show that they will enforce such law on the offenders at any rate. However, hitherto, no pawnbroker's licence has been revoked although malpractices are prevalent in the trade.

D. Provisions Regarding to the Prevention of Unlawful Dealings

Part IV of the Pawnbrokers Act 1972 deals with this subject matter. The primary purpose of provisions embodied in this part is meant to deter pawnbrokers who have unhealthy inclination to act as fences in stolen property from thieves and other persons of questionable character like drug addicts and juvenile delinquents who have laid their hands on articles presumable in most cases through unlawful means.

Section 28 provides that no person shall pawn or attempt to pawn the article of any person being duly authorised or employed in that behalf Section 29

mainly provides that it is the duty of the licensee to enquire and detain any person the proposed transaction is suspicious.

Section 31 (2) states that if any property answering the list and description is in the possession of any licensee, he must without unnecessary delay inform the nearest police authorities with the name and address of the person in whose possession the property was seen and in default, he shall be guilty of an offence and liable on conviction to a fine not exceeding $500. In Section 31 (3), the licensee may also detain such person until the arrival of the police.

Section 33 empowers certain designated officers, authorised in writing by the Minister to inspect the licensee's books or any pledges on reasonale suspicion to have been in the pawnshop premises in questionable circumstances.

Section 34 provides for the restoration to the owner by the pawnbroker of any pledge lost or dishonestly or fraudulently obtained.

With regard to the question of inquiry as to ownership, the court held in Lam Fong Tze v R[13] that

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[13](1933) SS LR 224

before a magistrate makes an order for the return of pawned property alleged to have been stolen there must be evidence of ownership and of unlawful pawning. This was in relation to S. 27 of the then Pawnbrokers Ordinance S.S. Cap 216.

In Lam Lock v R,[14] the court held that when a pawnbroker hands over property to the police which is suspected to be stolen, the property may be taken before a court. The court must satisfy itself by hearing evidence as to who is entitled to possession of the article, who is the owner and the circumstances under which the article was lost or found. To do this, the court should procure the attendance of the pawnbroker and satisfy itself that the article was unlawfully pawned. The person claiming the article as against the pawnbroker should also be notified to attend court at the same time as the pawnbroker.

The question of an appeal against the courts order for delivery-up of pledge to the owner can be illustrated by Chop Sum Thye v R.[15] In that case, the appellant pawnbrokers received in pawn certain diamonds which proved to be the very diamonds stated in a police

[14](1933) SS LR 58
[15](1933) SS LR 503 C.A.

Circular to have been missing from a jeweller. The thief and receiver of the diamonds were arrested, tried and convicted of theft and dishonestly receiving stolen property respectively. After the conviction was recorded, the prosecutor applied for return of the diamonds. Counsel who watched those proceedings on behalf of appellants opposed the application. The magistrate made an order for unconditional restitution. The court held inter alia, that the question of ownership of the diamonds could not be reopened, the order being consequential upon the facts disclosed in the trial to which the appellants could not be a party.

On the other hand, in R. v Yoon Choon Pawnshop[16] a firm of jewellers employed a salesman and handed to him certain articles of jewellery to be sold by him on their behalf stipulating that the property was to remain in the company until the said prices were paid to the company. The salesman handed some of the jewellery to a broker to sell, receiving in turn receipts of the articles. The broker instead pawned the jewellery with various pawnbrokers. The court held that the broker was a mercantile agent and he was acting in the ordinary course of business of an agent and thus he had power to sell the jewellery. An agent who has been entrusted

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[16](1939) SSLR 242

with the power of sale has also got the lesser power to pledge the articles and therefore the pawnbrokers had good titles and the jewellery should only be delivered to the firm on payment by them to the pawnbrokers of the amounts paid by the pawnbrokers to the pledger in each case.

Again in Sem Hin Pawnshop v R.[17] illustrates the question of delivery up of pledge. In that case, the magistrate ordered the pawnbroker to return a watch which had been unlawfully pawned to the owner whose ownership was conclusively proved. Against the order, the pawnbroker appealed. The court held that where ownership has been proved by common law, the owner would be entitled to the article unconditionally, however careless he had been. In a case where the conduct of both parties is free from criticism in no circumstances would the court order the owner to pay a part of the loan and the innocent pawnbroker must suffer for having taken a risk which is inseparable from his trade.

Nevertheless in Ho York Quin v R.[18] the accused had been convicted under S. 420 of the Penal Code for cheating by pawning a watch belonging to another person.

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[17](1952) MLJ 164

[18](1953) MLJ 1

In P.P. v Lee Poay Kee,[19] the court there also shared the same view. After conviction, the magistrate ordered the return of the watch to the owner. The appellant pawnbroker appealed Murray-Aynsley C.J. held that the court has the discretion on whether to make an order or not and it is a safe rule that in cases of doubt or difficulty an order should not be made.

The judgement of Ho's case was approved in P.P. v Yoong Shing Pawnshop & Ors[20] four years later. There the court held that in any case where articles pawned are produced as exhibits in court, before making any order in respect of such exhibits, it is incumbent on the magistrate to inquire under section 20 of the then Pawnbrokers Enactment (F.M.S. Cap 85) and after holding of such inquiry, he has full discretion as to whether to make an order or not. During such inquiry, if ownership of articles is proved and conditions of section 20 are fulfilled, the owner is entitled to the articles unconditionally and an order to that effect should be made. There may be circumstances where a conditional order is justified and finally there may be circumstances where ownership of articles is a question

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[19] Criminal Revision No. 8 of 1969

[20] (1957) MLJ 131

of doubt and difficulty and in such cases it is a safe rule that no order should be made.

On the whole, there are adequate provisions provided against the pawning of stolen articles. However on closer analysis a conspicuous shortcoming emerges in that there is no provision for any reference from a respectable or responsible person at the time of pawning valued at more than $2,000.

B. Provision for Appointing Inspectors of Pawnbrokers

Section 10 (2) of the Act 1972 empowers the Minister through notification in the Gazette to appoint the Inspectors of Pawnbrokers in each State as may be necessary for the purposes of the Act. The number of inspectors so appointed differs from state to state and they are not full-time officers. Normally, the District Officer or the Assistant District Officer are appointed as inspectors in each state in addition to their main duties.

Inspectors can be a form of control in the sense of being instrumental in enforcing the law by exposing any malpractice on their rounds of inspection.

F. Minor Offences Ordinance 1955 as a Form of Control

Under section 30 of the Ordinance, certain acts if carried out by any pawnbroker will be considered offences. The section states that any pawnbroker who within the period of ten days of receiving any goods or any platinum, gold or silver metal or articles or after receiving information from the police that any such mentioned articles have been stolen or fraudulently obtained, melts, alters or defaces the articles of this type without prior permission of the Chief Police Officer and if proven they are stolen or fraudulently obtained the pawnbroker shall be liable to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding six months or both. However, the proviso in the same section provides that the pawnbroker will be exonerated if he receives the mentioned articles from pawnbroker, second hand dealer or worker or dealer in platinum, gold or silver if they had been retained by those persons for at least the period referred to above.

G. Control Over Moneylenders: General Observations

It is an undeniable fact that a control machinery operates as a vital instrument to control the malpractices in any institution, including the moneylending institution

being discussed here. However, it is arguable to what extent it is effective in practice. Nevertheless, still the mere presence of it can serve to deter at least the flouting of the law openly. Therefore, in essence, the basis of the Moneylenders Ordinance 1951 is geared towards this aim. To substantiate this assertion, the various forms of control embodied in the Ordinance will be looked into.

H. The Licensing Provisions

Under section 5 (1) of the Ordinance, every moneylender has to take out a licence annually to conduct moneylending business. This can be considered as a form of control in the sense that it deters the mushrooming of unlicensed lenders which inevitably will contribute to abuses in the trade. It also helps to screen undesirable elements from the moneylending establishment. In Sadhu Singh v Sellathurai[21] the appellant sued the respondent for $2,000 on a cheque given to him as security for a loan which was subsequently dishonoured. The respondent pleaded that at the time of the transaction, the appellant was an unlicensed moneylender and thus debarred by section 15 of the Ordinance from enforcing

[21] (1955) MLJ 117

the contract. The court held that since it was proven that money was given on interest then the burden of proof had shifted to the appellant, the lender, that he was not a moneylender, otherwise the presumption would be that he was a moneylender and which was so in this case. Being not registered, therefore he could not recover the loan.

In the latest case of Soh Eng Keng v Lim Chin Wah,[22] the plaintiff claimed against the defendant for a sum of $34,790 and interest in respect of what he called a friendly loan. The issues which arose in the case were whether the loan transaction had contravened the Moneylenders Ordinance 1951 and if so whether the plaintiff was nevertheless entitled to restitution of the amounts actually loaned. Wan Yahya J held that on the facts, the defendant had proved that the plaintiff was an unlicensed moneylender and therefore section 15 of the Ordinance made the agreement between the parties unenforceable as well as being void by virtue of section 2 (g) of the Contracts Act. Plaintiff was an unlicensed moneylender who had contravened section 15 of the Ordinance and had loaned money at excessive interest contrary to section 22 and who was aware at all times of the nature of his transactions. Again in another

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[22](1979) 2 MLJ 91

case of the same year, in Soo Lin Chong v Lee Yaw Seong[23] the court held that where a so called friendly loan was given, the lender could not recover it because he was not a licensed moneylender.

These cases reflect the control of the licensing provision to check abuses in the trade. The courts have taken a strict view that an unlicensed moneylender cannot enforce a contract for repayment of the loan.

Section 9 (1) restricts the issuance of licences if

a) on evidence, the applicant or the management of a firm or company is of questionable character.

b) such category of persons are not fit and proper to hold a licence.

c) such category of persons, have been disqualified from holding a licence.

d) the applicant has not complied with section 5 of the Ordinance.

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[23](1979) 2 MLJ 48

e) the applicant or his firm has knowingly lent money to a person under the age of eighteen.

Besides, an application by an agent[24] is also similarly refused on such grounds mentioned. Thus, this section aims to safeguard the institution from applicants of doubtful character. In practice, the application form must be accompanied by the testimony of the police with regard to the good character of the applicant in the sense that he has no police record. The registrar then sets the date for hearing of the application to decide whether or not a licence should be issued.

I. Suspension and Forfeiture of Moneylender's Licence

Section 10 (1) and (2) fo the same Ordinance provides for suspension and forfeiture of a moneylender's licence if the holder is convicted of any offence under this Ordinance. This section can be very effective in weeding out unethical moneylenders from the institution provided the authorities concerned must show that they will not hesitate to utilize this section should any of the lenders contravene the law. The mere presence of this provision without enforcement will not deter the the shrewd moneylender to flout the law indirectly.

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[24]Section 9 proviso

J. Unenforceable Contracts

This provision states that a contract entered into by an unlicensed moneylender is unenforceable. Cases of this nature have been illustrated under the part licensing provisions above. Another example can be seen in the Federal Court case of T. Chellapah v Official Assignee[25] where the official assignee rejected the claim of the appellant as he concluded on evidence that he was an unlicensed moneylender. There it was held that the onus was on the appellant to rebut the presumption raised under section 3 of the Moneylenders Ordinance from the fact that he had lent money to the debtor at interest and as the appellant had failed to discharge this onus, the application was rightly dismissed.

Section 16 (1) further lays down that the note or memorandum of the moneylenders' contract is to be given to the borrower. In Thangavelu v Saudagar Singh,[26] the court held that the failure of the moneylender to specify the rate of interest was held to be in breach of the provisions of section 16 and therefore the contract was unenforceable.

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[25](1971) 1 MLJ 24

[26](1965) 1 MLJ 39

In Karuppiah Pillai v Kaka Singh,[27] a registered moneylender had given loan to a friend without a note or memorandum but took cheques as security, the court held that the loan could not be enforced. In Associated Finance Corporation v Poonani,[28] where the date of the loan was shown as 16th September and the cheque was given on 11th October and the memorandum was not duly authenticated as required by section 16, the court did not enforce payment of the loan.

In Overseas Union Finance Ltd. v Lim Joo Ching,[29] where a loan was given on January 18th but the memorandum was signed and delivered on January 21st the court held the contract to be void. The courts have taken a strict view of these technical requirements due to certain malpractice of moneylenders who sometimes give a smaller amount of loan but an agreement is made to repay a larger amount. The question of technical requirement arose in Karuthan Chettiar v Parmeswara Iver[30] where the memorandum stated the rate of interest as 18% per annum/ per month the court held the agreement to be unenforceable. However, the Federal Court in the same year in Chai San Yin v Kok Seng Fatt[31] disregarded a clerical error where

[27](1973) 2 MLJ 96
[28](1972) 1 MLJ 117
[29](1971) 2 MLJ 124
[30](1966) 2 MLJ 151
[31](1966) 2 MLJ 54

the date was put as 22nd and not as 23rd August.

In Sabchant Kaur v Chai Sau Kian,[32] the court observed that the intention of giving an authenticated copy of the memorandum or note is that the borrower should be given by the lender for retention written particulars of the loan and its terms so that there may never be any doubt at any time concerning the amount or its terms. Mere temporary physical delivery of a memorandum of charge for the purpose of execution by the borrower does not constitute delivery under section 16.

Thus, it can be gauged from all the above cases that the intention of section 16 is to protect borrowers from exploitation by the moneylenders and to avoid disputes as to the actual terms of loan transactions. It checks fraudulent practices by requiring the authentication and delivery of the memorandum of contract by the lender to the borrower before money is lent. In this way the documents are safeguarded from being tampered with, although it is a notorious fact that in actual transactions, most moneylenders do not follow this law. Nevertheless, moneylenders must be reminded to comply strictly with the technical requirements of the Ordinance if they wish to recover their money.

[32](1958) MLJ 32

K. **Provision for Accounts to be kept in Permanent Books**

Section 18 (1) (2) of the Ordinance provides for keeping permanent accounts. In Nasib Singh v J ,[33] on August 4th 1965, the respondent, a lady school teacher gave the appellant, a moneylender her promissory note for $1,500 bearing interest at 18 per cent per annum. The appellant's claim was for the total sum of the principal and interest due less the sum of $697.50 repaid intermittently on 21 occasions towards interest. The respondent's defence, inter alia was that she was in fact given a sum of only $500 against delivery of her promissory note. She was charged interest at 10 per cent per month and had been paying $50 each month regularly from September 1965 till December 1967 after which she had made further monthly payments of $20 to $30 each time amounting to $600 till December, 1969. However, the appellant's accounts contradicted what the respondent said. The issue was whether the respondent's account as entered in the appellant's book was true or false in relation to section 18 (2) of the Moneylenders Ordinance 1951 .

Ong C.J. of the Federal Court said that to

[33](1972) 1 MIJ 255

succeed in attacking that account so as to render the appellant's claim unenforceable by virtue of section 18 (2) it had to be shown that entries of relevant transactions in this very account were false. It was not sufficient merely to cast suspicion on it by reason of default or deficiencies detected in other accounts. Thus the onus of discrediting the statement of account rests on the borrower.

The Federal Court then held that the book entries of the appellant's account books provided intrinsic evidence that the respondent account contained false entries relating to payment of interest. The accounts of other debtors provided corroborative evidence that for all payments of interest the true date of payment was disregarded when entries were made. Therefore, the appellant had failed to comply with section 18 of the Ordinance.

What are regular accounts has been the subject of interpretation in Boor Singh v Abdul Majeed[34] where MacIntyre J, commented on section 18 (1)

> "To keep a regular account in my opinion would mean to keep an account book in which every entry is made as and when a transaction is completed and in chronological sequence."

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[34](1967) 1 MLJ 16 19

Section 18 further requires that the book should be so paged and bound so as "not to facilitate the elimination of pages or the interpolation or substitution of pages". Therefore it would be logical to infer from this directive that no blank pages should be left between the pages containing entries because such a practice would facilitate interpolation of entries.

It should be noted that failure to comply with the provisions of section 18 disentitles the moneylender from enforcing any claim in respect of any transaction. He is also subject to a fine not exceeding $50 or in the case of a continuing offence to a fine not exceeding ten dollars for each day or part of a day during which such offence continues.

In Patience Kasumu and Ors. v Gbadamosi Baba Egbe,[35] an appeal case from Nigeria, West Africa to the Privy Council, the facts in that case concerned the effect of non-compliance with statutory requirements of the Nigerian Moneylenders Ordinance. Ong Hock Thye F.J. said in Sundralingam v Ramanathan Chettiar's[36] case at page 213 that the decision in that case is binding on the highest court in Malaysia. The principle enunciated related to section 19 of the Nigerian Ordinance

[35](1956) A.C. p. 539
[36](1967) 2 MLJ 211

is in pari materia with section 18 of the Malaysian Moneylenders Ordinance of 1951.

In that case, the respondent had mortgaged certain lease hold land to allicensed moneylender (of whose estate, the appellants were the administrators) as security for a loan. The moneylender had admittedly kept no book recording the transaction as required by section 19 of the Moneylenders Ordinance of Nigeria and the transaction was therefore unenforceable by the moneylender under that section. The respondent instituted proceedings claiming redemption of the property and recovery of possession from the appellants.

The Privy Council held that the Ordinance there in enacting no loan which failed to satisfy the statutory requirements was to enforced, meant that no court of law was to recognise the lender as having a right at law to get his money back. If the court were to impose terms of repayment as a condition of making any relief it would be expressing a policy of its own in regard to such a transaction which was in direct conflict with the policy of the Ordinance. Thus the respondent was entitled to judgement. Per Lord Radcliff in that case:

"When the governing statute enacts
that no loan which fails to satisfy

> any of the requirements under the Nigerian Ordinance is to be enforceable, it must be taken to mean that no court of law is to recognise the lender of having a right at law to recover his money. That is part of the penalty which the statute imposes. There is no room to reform the terms of the loan since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made."

L. Provision for Reopening of Transaction

Section 21 (2) of the Ordinance is a vital section to control malpractices in the trade by empowering the Court to reopen past transactions of moneylending where there is satisfactory evidence that the interest charged in respect of the sum actually lent is excessive and that the transaction is harsh and, unconscionable or substantially unfair. This section represents a substantial departure from the general law as at common law, the courts cannot probe into contractual bargains unless one of the traditional recognised factors such as mistake, misrepresentation, incapacity, illegality or undue influence was present to defeat the contract. A contract can be held to be void or voidable but its terms cannot be rewritten by the court. Similarly in equity, a contract can be set aside as oppressive or unconscionable but the court cannot remould the

contract.[37]

However, this provision empowers the court to "reopen the t tion" where circumstances warrant it. It can be assumed that by "reopening" is meant an examination of the contractual terms between the parties and a remodelling of those terms if necessary.

With regard to what is a "harsh and unconscionable" transaction, the Oxford Dictionary refers to "harsh" as repugnant to feelings or judgement; cruel unfeeling. "Unconscionable" means "wholly unreasonable not guided or restrained by conscience". Apart from this definition, in Samuel v Newbold,[38] Lord Macnaghten viewed that the words "harsh and unconscionable" mean unreasonable and not in accordance with the ordinary rules of fair dealing."

The question of whether a moneylending transaction amounted to an unconscionable bargain can be seen in the case of Chia Keng Beng and anor v Taynappa Chitty,[39] the plaintiffs executed three promissory notes on getting

[37] law of Consumer Credit. Dr. Lee Chin Yen
Unsecured Transactions: Advances of Money
Moneylenders Act at pages 66 and 67

[38] (1906) A.C. 461, 471 (H.L)

[39] (1899) S.S. LR 6

certains loans from the defendant a moneylender and mortgaged their reversionary life interest in the rents and profits of a number of houses as security for the loans. They later brought an action to set aside the mortgage on the ground that it was an unconscionable bargain made with expectant heirs. The issue was whether the transaction was a hard bargain and tainted by fraud. In arriving at its decision that high rate of interest on loan on promissory notes was not an unconscionable bargain if the loan had not being made on the credit of the reversion and that secondly, giving mortgage at 6% per annum for $13,000 on reversion for more than amounts of notes was also not an unconscionable bargain, the court looked into the special facts and circumstances of this case. The trial judge, Hyndman Jones J held that it was a hard bargain within the legal meaning of the term on the facts disclosed in the evidence. The defendant appealed.

On appeal Cox C.J. held:

> "It is clear that the interest was very high but so far as I can see the doctrine of an unconscionable bargain had not entered into the transaction. The mere fact that excessive interest was charged was not sufficient to warrant the interference of the Court.His Lordship based his decision on two important facts. First, by a later new arrangement, the

> indebtedness of the plaintiffs towards the defendant was increased by about $600 who at the same time gave the plaintiffs a very large reduction in the rate of interest and secondly the defendant had given up one important claim against the mother."

In addition to this, Law J in the appeal observed that the plaintiffs had only made a bad bargain when they executed the mortgage on the three promissory notes. The first plaintiff appeared to be 34 years of age and to have been in business and he must be regarded as quite able to take care of himself. There seemed to be little or no evidence that the plaintiffs were in difficulties when they signed the promissory notes. Thus under the circumstances the appeal was allowed.

But on the other hand in the case of Chait Singh v Budin b. Abdullah[40] where the plaintiff, a Sikh moneylender sued the defendant, a Malay agriculturist, upon a promissory note which provided for interest at the rate of 36 per cent and the latter had deposited his mukim register extracts with the former, thus furnishing good collateral security, the Court held that in these circumstances it raised in the opinion of the court the presumption that the transaction was an

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[40](1918) 1 FM SLR 348

unconscionable one within the meaning of section 16 (iii) of the then Contract Enactment and thus liable to set aside. The plaintiff had failed to rebut the presumption that in cases where good security had been furnished and that when interest charged exceeded 18 per cent normally such circumstances would raise a presumption of this type.

The Court referred to the Indian Appeal Case of Abdul Majeed v Khirode Chandra Paland[41] quoted a part of the judgement there:

> "The trend of modern decisions is to hold that Courts have ample powers under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security the exaction of excessive and usurious interest in, itself raises a presumption of undue influence which it requires very little evidence to substantiate".

The judgement in that Indian case also quoted with approval a passage from the judgement of the Madras High Court:

> "The exploitation of the necessitious of the careless and inexperienced is a trade to be extirpated in the interest of the whole community as contrary to individual morality as well as to public policy".

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[41] I.I.R. 42 Cal p. 690

The Acting Chief Judicial Commissioner pointed out that the defendant before him was an illiterate man and that a presumption of the same strength would not arise in the case of a man of better education and having the advantage of some business experience. He added that if the parties had gone before the Collector for the purpose of executing a charge the Collector would probably have advised the borrower not to pay such an extravagant rate of interest.

As regards the interpretation of the words "substantially unfair" the Ceylonese case of Meyappa Chettiar v Seneviratne[42] held that the question whether a money transaction was "harsh, unconscionable or substantially unfair" was one of fact. On the whole, it appears that "harsh and unconscionable" suggests a degree of hardship and some moral turpitude while "substantially unfair" seems free from moral taint. In practice, it is complicated to size up a situation where "substantially unfair" will be relevant but not "harsh and unconscionable" or vice versa due to the flexibility in meaning given to the latter words by case law. The courts have shown that they are always more willing to term a transaction "harsh and unconscionable"

[42](1945) 30 Ceylon Law Weekly 80

thus leaving the impression that the words substantially unfair" are superfluous.

It should be borne in mind that this provision should be read together with sections 22 and 23 which prohibit the charging of excessive interest and expenses respectively. This provision of section 21 operates on the premise of general jurisdiction in equity to relieve against cases of such a nature. There is no hard and fast rule governing the exercise of this discretion by the court and basically, the reopening provision is designed to relieve the borrowers from exploitation and hardship arising from unfair loan transactions. This in itself is an assurance that the interests of the borrowers are adequately protected since the courts are inclined to be more sympathetic towards the borrowers, especially the illiterate, inexperienced and ignorant ones.

M. Provision for Attestation of Certain Promissory Notes

Section 27 (1) mainly lays down that whenever a promissory note is taken as security for any loan and the borrower does not understand the written language on such note, then the note shall be attested by certain designated persons. Section 27 (2) states that failure to do shall not entitle the lender to recover any loan.

In Sundralingam v Ramanathan Chettiar,[43] the Federal Court went to the extent of laying down that even though the borrower was aware of the terms and contents of a promissory note because of previous dealings between the parties, since the borrower did not understand the written language of the promissory note, it had to be attested in accordance with the law and being so not attested under section 27 of the Ordinance the contract was void.

In the same, Azmi C.J. said that:

> "The first requisite of that section 27 is that every promissory note written in a language not understood by the borrower must be attested."

The words "not understanding the written language on such note" means an inability to read and comprehend the language in which the note is written. His Lordship further explained that it would not be sufficient for purposes of section 27 (1) if the borrower although he could read the written words but could not understand their meaning or that he could understand themeaning if the note were read out to him by another person. In the last instance he had in mind Malays who are illiterate - a case of a Malay borrower who unable to

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[43](1967) 2 MLJ 211

read the written Malay on the note would be able to understand it however if the note is read to him by another person. In such circumstances he viewed such other person who reads out the note must be one of those enumerated under subsection (1) of Section 27.

N. Protection Against Inducement

Section 29 provides that it is an offence to induce any person to borrow money or to agree to the terms by stating false statements or representations. This section prohibits moneylenders from fraudulently making such false statements or representations so as to induce any person to borrow money or to agree to terms set by them. It appears that this provision is meant as a safeguard against exploitation of mainly illiterate ignorant and gullible borrowers.

O. Protection Against Harassment or Intimidation

Primarily, section 30 lays down that it is an offence for a moneylender or any person acting on his behalf to harass or intimidate a debtor or any member of his family. In practical terms, in the light of exposure by the various newspapers and the consumer movement on such illegal harassment or intimidation actually happening to some borrowers, this section

serves as a deterrent especially to the more knowledgeable moneylenders who resort to recover their money through this method.